United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF IN FORMA PAUPERIS
FOR APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,489

WILLIAM M, ROUSE, JR., Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

Appeal from Conviction on Two Counts for Violating Federal Narcotics Laws (26 U.S.C. § 4704(a), 21 U.S.C. § 174) in the United States District Court for the District of Columbia

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Attorney for Appellant
(Appointed by this Court)

STATEMENT OF QUESTIONS PRESENTED

1. Did the motions court err in refusing to grant appellant's motion prior to trial for the suppression of evidence on grounds that such evidence was obtained by unlawful arrest and illegal search and seizure, in view of the material inconsistencies and conflicts in the prosecution testimony at the hearing on said motion which related to the circumstances leading up to appellant's arrest?

2. Did the trial court err in refusing to hear and grant appellant's motion at the time of trial for dismissal on the same grounds as appellant's motion to suppress, where such refusal was based solely upon the prior denial of appellant's motion to suppress and where additional inconsistencies and conflicts in the prosecution testimony had developed at trial concerning the circumstances of appellant's arrest?

INDEX

TABLE OF CASES

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* Cases chiefly relied upon are marked by asterisks.

INDEX CONTINUED

STATUTES, RULES AND TREATISES

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BRIEF IN FORMA PAUPERIS
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JURISDICTIONAL STATEMENT

The indictment before the United States District Court for the District of Columbia charged violations by appellant of the Federal Narcotics Laws. Jurisdiction over the subject matters of this indictment was conferred upon the District Court by the provisions of 18 U.S.C.A. § 3231.

Appellant filed a notice of appeal to this Court following his conviction in the District Court. Jurisdiction over such appeal is conferred upon this Court by the provisions of 28 U.S.C.A. § 1291.

STATEMENT OF THE CASE

Appellant was indicted on February 15, 1965, under two counts charging unlawful possession of narcotics in violation of Federal laws.

On February 19, 1965, appellant filed a motion for the suppression of evidence on the grounds of unlawful arrest and illegal search and seizure. Appellant's motion to suppress was heard before Judge Walsh in the United States District Court on March 5, 1965.

The basis of said motion was that appellant was walking along the street in the early hours of the morning when an unmarked police cruiser pulled up alongside of him and two police officers not in uniform got out and stopped appellant, searched him, seized some narcotics found in his possession and then arrested him. Appellant asserted that these officers had neither warrant nor probable cause to apprehend or search him. The narcotics thus seized were the subject of the motion to suppress. (M. Tr.* 2-3)

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* M. Tr. refers to the transcript of the hearing on the motion to suppress on March 5, 1965.

Appellee opposed the motion to suppress on the ground that appellant had abandoned the narcotics in the alley, within eyesight of the police officers, by placing the narcotics on a pile of wooden pallets from which the narcotics were recovered by the officers, after which they arrested him. Appellee argued that there had been a total abandonment of the narcotics and that the narcotics had not been obtained from appellant by seizure. (M. Tr. 3)

In response to a question from the Court as to whether abandonment was prior to arrest, appellee's counsel further stated:

> It was probably simultaneous with the arrest, because the property had been put in some wood. The defendant was arrested for vagrancy because he is a known felon and the officers knew him to be a previous thief, in the alley at 4:15 in the morning. He began to run at the time he saw the Scout Car.
>
> On both theories we could argue our position. (M. Tr. 4)

The evidence presented at the hearing of the motion on March 5 consisted of testimony by the two arresting police officers and by appellant concerning the circumstances surrounding appellant's arrest.

The arresting officers testified to the effect that in the early morning hours of January 8, 1965, while on routine patrol in an unmarked police cruiser, they had come across appellant in an alley. (M. Tr. 8-13, 38-44) According

to them, when appellant saw the car he took flight, with the car in pursuit, ran into an intersecting alley and placed a package which contained narcotics on a pile of wooden pallets in a corner, all within eyesight of the officers, whereupon they retrieved the narcotics and placed appellant under arrest. (M. Tr. 15-32, 45-53)

Both of the officers testified that appellant was known to them. Officer Whited stated he had seen appellant "on the street at a late and unusual hour" on two other occasions. (M. Tr. 6, 23) He further said that he recognized appellant while following him in this case. (M. Tr. 29) When they caught up with appellant, this officer testified he questioned appellant concerning "his presence on the street constantly, at late and unusual hours." (M. Tr. 22-23) However, he denied stopping appellant "thinking that he was a vagrant." (M. Tr. 28)

The other officer, Jenkins, testified that he previously had observed appellant "loitering along the 1900 block, 1800 block of 14th Street," and "had seen him a couple of times," and "knew who he was." (M. Tr. 39-41, 61) He further said he recognized appellant while pursuing him in the alley in this case and knew at that time "that he was a known and convicted thief." (M. Tr. 60)

Each of the officers testified that they had neither arrest nor search warrant for appellant at the time of his

arrest, that they had no reports of any crime in the area having been committed immediately prior to the time in question, and that they had no reason to believe appellant had committed a crime prior to their recovery of the narcotics allegedly abandoned by appellant. (M. Tr. 12-13, 17, 48, 57-58) Each officer further testified that appellant was ordered to stop and stand still and not move when they arrested him, and that appellant was searched at that time. (M. Tr. 22, 28, 48, 55-58)

There were a number of discrepancies and conflicts in the testimony given by the police officers relating to the circumstances surrounding appellant's arrest. In this connection it should be noted that at the beginning of the hearing these witnesses were excluded from the courtroom and sent to the witness room. (M. Tr. 2)

At the outset there was a question concerning the route of the police cruiser immediately prior to entering the alley where appellant allegedly was first observed. Officer Whited testified they had been traveling south on 14th Street, turned right onto R Street going west and then turned into the alley. (M. Tr. 10, 12, 19) Officer Jenkins, however, was unable to recall where the cruiser had been immediately prior to entering the alley. (M. Tr. 42-43)

The testimony of the two officers was in direct conflict regarding appellant's position in the alley when

he was allegedly first seen by them, and the direction in which he was then headed. Officer Whited testified that appellant was "Just a short distance" into the alley off of R Street, which he approximated to be about the same distance as from the witness stand to the door at the back of the courtroom, and not as far as the mid-way point in the alley between R and S Streets. (M. Tr. 12, 16) He testified that appellant was walking in a direction away from the police cruiser when it entered the alley, and that appellant "looked back" when they came into the alley. (M. Tr. 13, 16) He also testified that the police cruiser had its "high beams on" when it entered the alley. (M. Tr. 12)

Officer Jenkins' testimony was directly to the contrary in each of these respects. He testified that appellant was "not anywhere" near R Street in the alley when they entered, but that he was "near the north end of the alley" which was "Towards S Street." He said appellant "was walking south through the alley. We were headed north through the alley," and that appellant was "facing" the police cruiser and "coming towards us," when they first saw him. (M. Tr. 43-45) Officer Jenkins testified at first that the cruiser had on its high beams when it turned into the alley (M. Tr. 43), but later contradicted himself by stating that after they saw appellant, "Officer Whited put the high beams on him." (M. Tr. 45)

This conflict in testimony continued with respect to the course taken by appellant after he allegedly was seen by the officers. The alley in which appellant purportedly was first sighted runs north from R Street in a straight line into S Street. (M. Tr. 15, 18, 42) Officer Whited testified that, after they followed appellant in a northerly direction along this alley, appellant turned "left" into an intersecting alley running west toward 15th Street. (M. Tr. 17-20) Officer Jenkins' testimony was directly the opposite. He said that appellant was coming through the alley "towards" them from S Street and that, when appellant reached the intersecting alley running east and west, appellant made a "right turn" into this alley. (M. Tr. 45-46)

Likewise there was absolute conflict between the testimony of the officers with respect to who was driving the police cruiser at the time of appellant's arrest. Officer Whited testified that he was not driving, that he was on the passenger side and that he was "positive" officer Jenkins was driving. (M. Tr. 11) Officer Jenkins, on the other hand, testified that "officer Whited was driving the cruiser this night," and that "I was not driving," and "was on the passenger side." (M. Tr. 39, 43, 44)

Appellant testified at the March 5 hearing that he was walking along S Street coming from 15th Street towards 14th Street to get a taxicab in the early morning hours of

January 8, when a black Plymouth pulled up alongside of him, "these two officers here jumped out," one of them said "Hold it," whereupon appellant stopped. (M. Tr. 62-64) The officers seized appellant, told him to put his hands up, made him put his hands against the automobile and, over his protests, searched him and took a package out of his pocket and then charged him with narcotic violations and vagrancy. (M. Tr. 64-65)

Appellant denied that he was in an alley at the time of his arrest, or that he had placed any package on wooden pallets or wooden racks of any kind. He further testified that he was doing nothing to arouse suspicion, that he was not drinking, and that he was standing upright and walking along the street in a normal manner. (M. Tr. 65-66) On cross-examination appellant admitted that the package taken by the police officers from his pocket contained heroin. (M. Tr. 66-67) He also admitted to previous convictions for petit larceny and a grand larceny conviction. (M. Tr. 67-69)

In argument on the motion to suppress following the testimony, counsel for appellee conceded that, if the police officers had made an illegal arrest and searched appellant, the evidence thus obtained would have to be suppressed by the Court, but argued that such was not the case here. (M. Tr. 74) Counsel for appellant contended that was precisely

what had taken place and urged the inconsistencies in the police testimony in support of this position. (M. Tr. 69-73)

The Court expressed considerable "concern" over the conflict in the police officers' testimony. (M. Tr. 75-76) When counsel for appellee referred to "the slight inconsistency," the Court interrupted "Wait a second. Is it slight?" and pointed to the conflict as to which officer was driving. (M. Tr. 76-77) When counsel for appellee characterized this as "an immaterial matter," the Court again interrupted (M. Tr. 77), and expressed the view that testimony relating to the facts leading up to the alleged crime should be "somewhat consistent." (M. Tr. 79)

After considerable discussion of these matters (M. Tr. 71-80) the Court finally ruled as follows on appellant's motion to suppress:

> All right, Mr. Koonz, the Court is going to deny the motion, and with a right to renew, of course, during the course of the trial, and you are appointed counsel.
>
> MR. KOONZ: Yes, I am, your Honor.
>
> THE COURT: And you can request the Court to make a forma pauperis order to have this matter transcribed, so that you will have a transcript at the time of trial. [M. Tr. 80-81]

Trial of the case began before Judge Matthews on April 26, 1965. The rule on witnesses was invoked and witnesses retired to the witness room. (Tr.* 5)

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* Tr. refers to the transcript of the trial proceedings.

Officer Jenkins was the first witness for the prosecution. He testified that "I recall now, sir, that I was driving the vehicle at that time," that "When we originally entered the alley the lights [of the police cruiser] were not on," and that when they got into the alley he turned the head lights on. (Tr. 8) He stated that he saw appellant after they entered the alley, and that appellant was "approximately half the distance of the alley" and "approximately twenty to twenty-five yards" from the car when first seen by the officer. (Tr. 8)

Officer Jenkins further testified that as soon as he saw appellant, appellant "began running north through the alley, the rear of the 1700 block of 14th Street, west through the adjacent alley in the rear of the 1400 block of S Street," that he "immediately stepped on the gas and pursued" appellant, that this required the police car "to make a left turn" into the intersecting alley to the west, following appellant who had turned "left" into the intersecting alley. (Tr. 9-10, 30)

Under cross-examination, officer Jenkins testified that he recognized appellant "Sometime in the alley," but was not sure whether it was before or after he stopped appellant. (Tr. 23) He then recalled that he and his partner had been "proceeding south along 14th Street, we made a right-hand turn west on R Street, another right-hand turn going north in the

alley of the rear of the 1700 block of 14th Street." (Tr. 23-24) He reaffirmed his testimony given on direct examination that the car lights were out when they entered the alley, that he was driving, and that as soon as they entered the alley he turned the high beams on and saw appellant. (Tr. 24-26)

Officer Jenkins further testified on cross-examination that when he first saw appellant in the alley appellant was about in the middle of the alley "Between R Street and S Street," that appellant "had his back to us when we first saw him. When we turned the lights on, he turned back and looked in our direction," and that he was driving the cruiser. (Tr. 26) He reasserted that appellant "continued north through the alley," that when they entered the alley he turned on the high beams, that appellant then "was walking north through the alley," that appellant "turned back and looked in our direction, he turned back north again and began to run," after which appellant "turned left," into the intersecting alley. (Tr. 30-32)

Officer Jenkins was then confronted with his previous testimony at the hearing on the motion to suppress to the effect that he was on the passenger side of the cruiser; that Officer Whited was driving; that he did not recall where they had been prior to this time; that the high beams of the police car were on when they entered the alley; and that

appellant was at the other end of the alley walking south and facing the police car; all of which testimony the officer admitted having given on March 5. (Tr. 26-29)

When pressed on cross-examination as to whether he was "certain today" that he was the driver of the car, officer Jenkins replied "Yes, I am positive." However, he admitted that he had not been certain five weeks prior thereto. (Tr. 32) After again denying that he was a passenger in the car on the morning of the arrest and not the driver, he was asked which testimony "do you want us to believe," to which he replied "This testimony." (Tr. 36-37)

When asked to explain the discrepancy in his testimony and what had he done in the meantime "that made you change your mind," the officer testified:

> I haven't done anything in the meantime to change my mind except to go over the facts with my partner. As I attempted to tell you a bit earlier, I had the facts of this case confused with another narcotic case involving a subject of similar circumstances in which an arrest was made just about twenty days prior to this one. [Tr. 37]

Further, in response to inquiry as to "what conversations did you have with your partner after the last hearing that has made you change your testimony," the officer replied "Things that we had done during the course of the morning that reminded me that I was the driver of the vehicle on that evening." (Tr. 37)

At the conclusion of this testimony, counsel for appellant moved to dismiss the indictment on grounds of unlawful arrest and illegal search and seizure. He stated that the motion previously had been made and decided upon, but asked the Court "to review what took place before." Counsel pointed out the difficulties that Judge Walsh had had with the inconsistencies in testimony and that appellant's right to raise the motion at trial had been specifically reserved by Judge Walsh. (Tr. 71)

The trial Court then stated:

> Now, this Court doesn't ordinarily rehear motions of this nature, where one Judge has already passed upon it. When the case comes in here, it comes for trial. So I am not disposed to hear your motion now. We have started the testimony in this case and I want to go forward with that. At the end of the presentation of the evidence, then if you want to argue something, you can. [Tr. 71-72]

Officer Whited was next called to the witness stand. His testimony in substantial part was similar in effect to his previous testimony on the motion to suppress, although such testimony was not consistent throughout. At trial, for instance, he was unable to recall whether the car lights were on at the time they turned into the alley, but testified that shortly after they entered the alley the lights were on. (Tr. 79-81) His previous testimony was unequivocal that the police cruiser had on its high beams when they

turned into the alley. Supra, p. 6.

There was substantial conflict between the trial testimony of the two officers with respect to the position of appellant in the alley when first sighted by them. Officer Whited testified that, as they drove into the alley, "I observed the defendant a short distance in front of the car." (Tr. 74) On cross-examination he further testified that, when the police car turned into the alley off R Street, appellant "was only a short distance in front of the car... about as far from here [the witness stand] to the door [of the courtroom]." (Tr. 79) He subsequently described this distance as "less than half the distance" down the alley from R Street. (Tr. 82) Officer Jenkins' trial testimony had placed appellant as substantially farther down the alley from R Street. Supra, pp. 10-11.

In response to inquiry on cross-examination as to whether he had talked with anyone else concerning this arrest since March 5, witness admitted that "Officer Jenkins and I talked about the case." He denied that he had pointed out to Officer Jenkins that he was driving the car and Jenkins was not, saying, "I stated Officer Jenkins was driving the car and after we talked about the case and I brought out certain things, he remembered that he was driving the car." (Tr. 89-90) His testimony further indicated that he talked with Jenkins about the direction in which appellant was headed

when they turned into the alley. (Tr. 90)

At the conclusion of the testimony of the second officer, the trial court inquired about the previous hearing on the motion to suppress and asked to examine the transcript thereof. (Tr. 94) Counsel for appellee argued that there was "no necessity for another hearing," that the previous ruling was "the law of the case," and that such action constituted "a final denial." (Tr. 94-97)

The Court alluded to the fact that the prior ruling "gave him [appellant] the right to renew the motion at the time of trial." (Tr. 95) When counsel for appellee said that appellant "had that right" anyway, the Court commented "Well, I don't usually, after one Judge has ruled on the motion to suppress evidence, I don't usually hear it again. I let them rely on the showing made at that time," and further stated "if Judge Walsh has gone into this matter thoroughly and made this ruling, I don't see any reason for taking up the time here going into this same matter again." (Tr. 95)

The trial court, after review of the transcript of the March 5 hearing, denied appellant's motion to dismiss "on the basis of this very full hearing that you have already had before Judge Walsh." (Tr. 99) When counsel for appellant asked whether this denial was "separate and apart from the proceedings before Judge Walsh," the Court replied:

> No. I told you yesterday that the position this Court shall take is that when a full and complete hearing has been had in a motion to suppress, that then this Court regards that as the law of the case and doesn't hear the whole thing over again. [Tr. 100]

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides in relevant part that the right of individuals to be secure in their persons and effects "against unreasonable searches and seizures" shall not be violated.

The Fifth Amendment guarantees in material part that no person shall "be deprived of life, liberty or property without due process of law."

STATEMENT OF POINTS

1. Appellant's motion to suppress prior to trial should have been granted because of the major inconsistencies and conflicts in the police testimony with respect to the circumstances surrounding appellant's arrest.

With respect to Point 1, appellant desires the Court to read the following pages of the reporter's transcript of the hearing on the motion to suppress on March 5, 1965: M. Tr. 2-4, 6, 8-13, 15-32, 38-53, 55-58, 60-80.

2. Appellant's motion to dismiss at trial should have been heard and granted in view of the additional major inconsistencies and conflicts in the trial testimony of the police relating to the circumstances at the time of appellant's arrest.

With respect to Point 2, appellant desires the Court to read the following pages of the reporter's transcript of the hearing on the motion to suppress on March 5, 1965: M. Tr. 81, and the following pages of the reporter's transcript of trial: Tr. 8-10, 23-32, 36-37, 71-72, 74, 79-82, 89-90, 94-97, 99-100.

SUMMARY OF ARGUMENT

Appellant's motions to suppress and to dismiss each presented substantial questions with respect to violations of constitutional rights. The motion to suppress prior to trial should have been granted in view of the substantial conflict in the testimony of the arresting officers with respect to material matters pertaining to appellant's arrest. The motion to dismiss at trial should have been heard and granted because of further material conflicts in such testimony. Appellant has been twice denied the protection of his constitutional rights.

At the hearing on appellant's motion to suppress prior to trial, substantial issues of fact arose concerning

the circumstances of appellant's arrest. Material discrepancies and conflicts in the police testimony raised substantial doubts concerning its credibility. The motions Court expressed considerable concern over this, but denied the motion with leave to renew it at trial. This denial was error.

At trial one of the officer's reversed his previous testimony in important respects, both officers admitted discussing the case subsequent to such testimony, and additional inconsistencies and conflicts occurred in police testimony. Nevertheless, when appellant renewed his motion to dismiss, the trial Court refused to hear the motion and denied it solely on the basis of the prior denial by the motions Judge. This refusal and denial was also error.

ARGUMENT

The fundamental issues before this Court involve the denial of appellant's motions to suppress and dismiss on grounds of unlawful arrest and illegal search and seizure. Denial of appellant's motion prior to trial was error. This error was repeated in the denial of appellant's motion at trial. Appellant's conviction therefore should be reversed.

A. Appellant's Motions Raised Substantial Constitutional Questions

Appellant's motions to suppress prior to trial and to dismiss at trial each raised substantial constitutional

questions. The bases for said motions were unlawful arrest and illegal search and seizure in violation of rights guaranteed by the Fourth Amendment to the Constitution.

Appellant contended that he was walking along the street during the early morning hours in a proper and lawful manner when he was stopped by two police officers who searched him, found narcotics in his possession and thereafter arrested him. Supra, pp. 2, 7-8. The police had no warrant for the arrest or search of appellant and, according to appellant's story, had no probable cause to arrest him. Supra, pp. 4-5.

The narcotics thus taken from appellant were the subject of appellant's initial motion to suppress evidence and appellant's subsequent motion to dismiss at trial. There cannot be any serious doubt but that appellant's motions raised substantial constitutional questions. Counsel for appellee already has conceded that, if the police had made an illegal arrest and searched appellant, any evidence so obtained would have to be suppressed. Supra, pp. 8-9.

The law is clear that, under appellant's version of the facts relating to his arrest, such arrest was made without probable cause and that evidence obtained by such means cannot be used to convict him. E.g., Rios v. United States,

364 U.S. 253 (1960); Johnson v. United States, 333 U.S. 10 (1948); United States v. DiRe, 332 U.S. 581 (1948); Wrightson v. United States, 95 U.S. App. D.C. 390, 222 F.2d 556 (1954); Cervants v. United States, 263 F.2d 800 (9th Cir. 1959).

Therefore, appellant's motions to suppress and dismiss in the present case raised substantial questions concerning violations of appellant's constitutional rights.

B. Due Process of Law Required that Appellant Be Given a Hearing on His Alleged Constitutional Violations

Due process of law required that appellant be given a hearing to enable him to establish the violations of constitutional rights alleged in appellant's motions to suppress and dismiss. It is self-evident that the individual liberties guaranteed by the Constitution must be subject to protection by the courts against the encroachment of law enforcement officers. Otherwise such liberties could be rendered meaningless in many instances.

The principle of law is well settled that defendants in criminal cases must be accorded a hearing on charges that evidence against them has been unlawfully obtained, or that other basic rights have been violated. McNabb v. United States, 318 U.S. 332, 346-47 (1943); Nardone v. United States, 308 U.S. 338, 341-42 (1939); Coplon v. United States, 89 U.S.

App. D.C. 103, 114, 191 F.2d 749, 760 (1951), cert. denied, 342 U.S. 926 (1952).

In McNabb v. United States, supra, the Supreme Court stated as follows in this regard:

> But where in the course of a criminal trial in the federal courts it appears that evidence has been obtained in such violation of legal rights as this case discloses, it is the duty of the trial court to entertain a motion for the exclusion of such evidence and to hold a hearing, as was done here, to determine whether such motion should be granted or denied. [318 U.S. at 346.]

Similarly, this Court has stated its own views on the subject in Coplon v. United States, supra:

> We conclude that the District Court erred in not affording a hearing as to the appellant's allegations that the government listened through a wiretapping device to her telephone conversations with her attorney before the trial and while it was going on.
> * * *
>
> A defendant in a criminal case may not legally be found guilty except in a trial in which his constitutional rights are scrupulously observed. No conviction can stand, no matter how overwhelming the evidence of guilt, if the accused is denied the effective assistance of counsel, or any other element of due process of law without which he cannot be deprived of life or liberty. [89 U.S. App. D.C. at 114.]

In the present case, appellant was afforded a hearing on his motion to suppress evidence prior to trial. Despite substantial discrepancies and conflicts in prosecution testimony with respect to the circumstances surrounding

appellant's arrest (supra, pp. 5-7), appellant's motion was denied. Supra, p. 9. Denial of this motion was error. Infra, pp 23-26.

When appellant moved to dismiss at trial, the trial court refused to hear said motion and denied it solely on the basis of the previous denial of appellant's motion. Supra, pp. 13, 15-16. The trial court was fully apprised of the matters set forth in the preceding paragraph. Supra, pp. 15-16. In addition, the trial court then had before it further material discrepancies and conflicts in the trial testimony of the arresting officers in such material respects. Supra, pp. 11-15.

This refusal of the trial court to hear appellant's motion to dismiss and this denial of said motion also was error, as will be subsequently established. Infra, pp. 26-30.

C. The Conflicts in Prosecution Testimony Were Such as to Destroy the Credibility of Such Testimony

The two arresting officers testified at the March 5 hearing on appellant's motion to suppress to the effect that they were patrolling in an unmarked car in the early morning hours of January 8 when they came across appellant in an alley which runs north and south between R and S Streets in the back of 14th Street, N. W., that appellant took flight when he saw them, that they followed him in the

car into an intersecting alley which runs east and west and saw him place a package on a pile of wooden pallets, that they retrieved the package which was found to contain narcotics and then arrested him. Supra, pp. 3-4.

However, there were a number of major conflicts in such testimony concerning the circumstances surrounding appellant's arrest which related to such material matters as who was driving the police car, appellant's position in the alley when first sighted by the police and his subsequent course of travel. One officer placed appellant just a short distance into the alley off of R Street, stated that appellant was headed north away from their car and looked back at them as they entered the alley, and that appellant turned left into the intersecting alley. Supra, pp. 6-7. The other officer said that appellant was near the opposite end of the alley towards S Street, that he was headed south facing the police car and that he turned right into the intersecting alley. Supra, pp. 6-7. Each officer swore without qualification that the other was driving the police car at the time in question. Supra, p. 7.

These conflicts caused the motions court to express considerable concern over the police testimony. Supra, p. 9. He rejected the efforts of counsel for appellee to minimize such matters and indicated that he viewed them as material.

Supra, p. 9. Although denying the motion to suppress, the motions court expressly reserved to appellant the right to renew his motion at trial and further directed that a transcript of the hearing be prepared for appellant's use at trial. Supra, p. 9.

At the time of trial, the first police officer called for the prosecution completely recanted his earlier testimony with respect to which officer was driving the car and the location and direction of travel of appellant in the alley. Supra, pp. 10-12. When confronted with his previous contradictory testimony and asked to explain the discrepancies between it and his trial testimony, the officer claimed that he had confused the facts in another narcotics arrest made about twenty days prior to the arrest in this case. Supra, p. 12. However, he admitted that since his last testimony he had gone over the facts of this case with his fellow officer. Supra, p. 12.

It was at this point that counsel for appellant moved to dismiss the indictment on grounds of unlawful arrest and illegal search and seizure. Supra, p. 13. Counsel pointed out the difficulties that the motions court previously had with the conflict in police testimony and that appellant's right to raise the matter at trial had been specifically reserved. Supra, p. 13. The trial court did not rule on

appellant's motion then, but indicated that it was not disposed to hear the motion at that time. Supra, p. 13.

The other police officer was next called as a witness. His testimony in some respects was in accord with his previous testimony, but in other instances differed from the trial testimony of his fellow officer. Supra, p. 13. He also admitted discussing the case with the other officer subsequent to the previous hearing. Supra, pp. 14-15.

At the conclusion of this testimony, the trial court asked to examine the transcript of the hearing earlier on appellant's motion, but indicated that its usual practice was not to again hear motions which already had been passed upon. Supra, p. 15. The following day the Court denied appellant's motion to dismiss solely on the basis of the prior hearing. Supra, pp. 15-16.

The foregoing conflicts in police testimony at the hearing on the motion to suppress were so material and so serious as to require the discrediting of such testimony and to require the granting of appellant's motion. The recanting of his previous testimony by one of the police officers at trial, as well as further inconsistencies in the police trial testimony likewise destroyed the credibility of such testimony and required hearing and granting appellant's motion to dismiss at the time of trial.

Essentially, appellant's motions involved only a factual determination with respect to the circumstances of his arrest. The law is clear that appellant's arrest was improper and that his conviction was improper, if the facts were as appellant related. Supra, pp. 18-20. The sole evidence to the contrary was that of the two arresting officers. If such testimony was not credible, no probable cause has been shown for appellant's arrest.

The conflicts in police testimony in the present case were far more extensive than the "inconsistencies" and "internal contradictions" relied upon by this Court in discrediting the police testimony relating to probable cause for arrest and in reversing defendant's conviction therefor in the recent case of Jackson v. United States, No. 19,134, decided on November 4, 1965. Accordingly, appellant is entitled to reversal of his conviction in the instant case on the basis of fundamental discrepancies which destroy the credibility of police testimony relating to probable cause for appellant's arrest.

D. The Trial Court Erred in Refusing to Hear Appellant's Motion to Dismiss

When the motions court denied appellant's motion to suppress, it expressed considerable concern over the conflict in prosecution testimony and explicitly reserved to appellant the right to renew his motion at trial and further directed

that a transcript of the hearing be prepared for appellant's use for that purpose. Supra, p. 9.

However, the trial court refused to hear the motion and denied the motion solely on the basis of the prior denial of appellant's motion prior to trial. Supra, pp. 15-16. At that time the trial court was fully informed of all that had taken place before the motions court. Supra, pp. 15-16. In addition the trial court was aware of the additional inconsistencies and conflicts in the police testimony at trial.

The trial court indicated that its refusal to hear appellant's motion was motivated in part by a desire not to interrupt the orderly procedure of trial and in part by the fact that a "full and complete hearing" had already been had on the motion and a prior ruling rendered by the motions court. Supra, p. 13.

In this the trial court was clearly wrong on both points. The orderly conduct of a criminal trial cannot be permitted to take precedence over the basic rights of a defendant. And, when additional evidence developes at trial -- as was the case here -- in support of a defendant's claim of unlawful arrest, the defendant must be given a hearing and opportunity to present such evidence and obtain a ruling. Defendant has been denied that right.

It is clear that, when a criminal case is in the process of trial, a defendant cannot avail himself of the claim of unlawful arrest except by a motion addressed to the court. For the issue of probable cause for arrest is solely a question for determination by the court and evidence on this matter cannot be presented to the jury. Steele v. United States, 267 U.S. 505, 511 (1925); Simmons v. United States, 92 U.S. App. D.C. 122, 123, 206 F.2d 427, 429 (1953); Shore v. United States, 61 App. D.C. 18, 19, 56 F.2d 490, 491, cert. denied, 285 U.S. 552 (1932).

Thus, appellant had no recourse at trial other than to move to dismiss and seek a hearing on the issue of probable cause for his arrest. The fact that appellant had previously had a hearing on this issue is immaterial under the circumstances of this case. Appellant was not seeking a redetermination of the issue on the same evidence. Appellant was seeking to have additional evidence received and considered. The action of the court in denying appellant's motion was based solely upon its prior denial without any consideration of the additional facts which had developed at trial.

The law is well settled by Supreme Court authority that such action by the trial court was error. McNabb v. United States, supra; Nardone v. United States, supra; Gouled

v. United States, 255 U.S. 298, 312-13 (1921).

The McNabb case expressly ruled that it was the duty of the trial court to interrupt the trial and hold a hearing when it appeared that evidence was obtained in violation of legal rights.

> * * * But where in the course of a criminal trial in the federal courts it appears that evidence has been obtained in such violation of legal rights as this case discloses, it is the duty of the trial court to entertain a motion for the exclusion of such evidence and to hold a hearing, as was done here, to determine whether such motion should be granted or denied. * * * The interruption of the trial for this purpose should be no longer than is required for a competent determination of the substantiality of the motion. * * * [318 U.S. at 346.]

Gouled v. United States, supra, is very close to the present case in holding that, despite a denial prior to trial of defendant's motion for the return of papers seized under a search warrant, the trial court was bound again to inquire into the constitutionality of their seizure when objection was made to their introduction in evidence at trial.

> The papers being of "evidential value only" and having been unlawfully seized, this question really is, whether, it having been decided on a motion before trial that they should not be returned to the defendant, the trial court, when objection was made to their use on the trial, was bound to again inquire as to the unconstitutional origin of the posession of them. It is plain that the trial court acted upon the rule, widely adopted, that courts in criminal trials will not pause to determine

> how the possession of evidence tendered has been obtained. While this is a rule of great practical importance, yet, after all, it is only a rule of procedure, and therefore it is not to be applied as a hard and fast formula to every case, regardless of its special circumstances. We think rather that it is a rule to be used to secure the ends of justice under the circumstances presented by each case, and where, in the progress of a trial, it becomes probable that there has been an unconstitutional seizure of papers, it is the duty of the trial court to entertain an objection to their admission or a motion for their exclusion and to consider and decide the question as then presented, even where a motion to return the papers may have been denied before trial. A rule of practice must not be allowed for any technical reason to prevail over a constitutional right. [255 U.S. at 312-13.]

CONCLUSION

For the various reasons set forth above, this Court should hold that appellant was arrested without probable cause in this case and should reverse appellant's conviction.

The Court should also hold that appellant has been denied due process of law by the trial court's refusal to hear and grant appellant's motion to dismiss on grounds of unlawful arrest and illegal search and seizure and should reverse appellant's conviction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of appellant's Brief in Forma Pauperis has been mailed, postage prepaid, to the Attorney General of the United States, United States Department of Justice, Washington, D. C., and to Frank Q. Nebeker, Esq., Assistant United States Attorney, United States Courthouse, Washington, D. C. 20001, this 15th day of December, 1965.

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REPLY BRIEF IN FORMA PAUPERIS
FOR APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,489

WILLIAM M. ROUSE, JR., Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

Appeal from Conviction on Two Counts
for Violating Federal Narcotics Laws
(26 U.S.C. § 4704(a), 21 U.S.C. § 174)
in the United States District Court
for the District of Columbia

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INDEX

TABLE OF AUTHORITIES

IN THE

UNITED STATES COURT OF APPEALS

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WILLIAM M. ROUSE, JR., Appellant,

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REPLY BRIEF IN FORMA PAUPERIS FOR APPELLANT

Preliminary Statement

The basic question involved on this appeal is the credibility of police testimony concerning the circumstances surrounding appellant's arrest. Normally this is an issue for determination by the lower court, which had the opportunity to hear and observe the witnesses. However, as appellee concedes, this matter is subject to review and

to reversal for clear error. Appellee's Brief, p. 7. The police testimony in the present case is inherently incredible,[1] and appellant's conviction should be reversed.

1. Denial of Appellant's Motion to Suppress Prior to Trial Was Clearly Erroneous

At the March 5, 1965, hearing on appellant's motion to suppress evidence, major conflicts arose between the testimony of the two arresting officers relating to the circumstances immediately preceding appellant's arrest. These matters included complete disagreement with respect to the position and direction of travel by appellant when the officers first allegedly observed him in the alley, and absolute contradiction as to which officer was driving at the time.[2] Appellant's Brief, pp. 5-7.

1/ There is no justification for asserting that "appellant's version of the facts surrounding his arrest is inherently incredible." Appellee's Brief, p. 7. Appellant's testimony of his unlawful arrest and search on the street contains no internal contradictions. Appellant's Brief, pp. 7-8. Neither can it be said that such testimony is contrary to human experience. Unfortunately, the case books are replete with similar instances of violations of constitutional rights of citizens by law enforcement officers.

2/ In addition, one officer was unable to state the route of the police cruiser just prior to entering the alley where appellant allegedly was sighted. Appellant's Brief, p. 5.

Such conflicts cannot properly be characterized as "minor inconsistencies," nor can they be exculpated as "related only to events leading up to the critical stage," as suggested by appellee. Appellee's Brief, p. 5. Appellee's present attempts to explain these matters are unavailing.

The fact that the hearing on the motion was "almost two months after appellant's arrest" (Appellee's Brief, p. 8) is no excuse for such serious testimonial conflicts in the police testimony.[3/] Equally untenable is the argument that inability of one of the officers to recall he was the driver "was understandable," because of their "usual practice...to alternate drivers each day."[4/] Appellee's Brief, p. 8. This is insufficient to explain why an officer who allegedly pursued appellant down an alley in a police car could not recall he was driving.

3/ Appellee relies upon police testimony given at the time of trial on April 26-27, 1965, which differed substantially from police testimony at the hearing on March 5, 1965. Appellee's Brief, pp. 8, 9. The trial itself took place nearly four months after appellant's arrest on January 8, 1965. Appellant's Brief, pp. 7-8.

4/ Actually the testimony was not that it was the usual practice of policemen assigned to cruisers to alternate the drivers each day, but that "Each particular tour of duty we alternate in driving." Motions Transcript, p. 11.

The court expressed considerable "concern" over the conflict in police testimony, questioned appellee's characterizations thereof as "slight" and "immaterial," and asserted that such testimony relating to events leading up to the alleged crime should be "somewhat consistent," but denied the motion. However, the court expressly reserved to appellant the"right to renew" his motion at trial. Appellant's Brief, p. 9.

Appellant's motion to suppress evidence which was unlawfully seized from him should have been granted, because the testimony of the arresting officers was inherently incredible on the entire record before the motions court. Denial of appellant's motion was clearly erroneous under the circumstances. This is the first error complained of in the present appeal, and requires reversal of appellant's conviction.

2. Denial of Appellant's Motion to Dismiss at Trial Was Clearly Erroneous

When the case came to trial, the first officer to testify recanted his prior testimony given at the motion hearing to agree with that of his fellow officer.[5/] Appellant's

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5/ At trial, this officer also was able to recall the route of the police cruiser immediately prior to entering the alley where appellant allegedly was apprehended. Appellant's Brief, pp. 10-11. The same officer, however, had been unable to testify with respect to such facts some seven and one-half weeks earlier at the time of hearing on appellant's motion to suppress. Supra, fn. 2.

Brief, pp. 10-12. The officer's excuse that he had confused the facts in the present case with another narcotics case (Appellee's Brief, pp. 3, 5, 8) is not credible. He admitted he had discussed the matter with his partner since the earlier hearing. Id. at 12.

Appellant's alleged abandonment of a package containing narcotics on a pile of wooden pallets in a corner of the alley, while being pursued by the officers in their cruiser at four in the morning, is not a commonplace occurrence. Conflicts in police testimony concerning events immediately preceding such abandonment cannot plausibly be explained in terms of confusing this arrest with another, in light of the unusual circumstances involved in the present case.[6/]

This reversal in testimony at trial by one of the police officers did not "clarify" or eliminate the conflicts in police testimony, as argued by appellee.[7/] Appellee's Brief,

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6/ Such an explanation is inherently incredible for the further reason that the police testimony was fairly consistent concerning appellant's alleged abandonment of narcotics in full view of the officers. It taxes credibility for the officer who testified to such facts to say that he had this case confused with another arrest.

7/ It was at the conclusion of testimony by this witness that appellant moved to dismiss the indictment on grounds of unlawful arrest and seizure. Appellant's Brief, p. 13.

pp. 3, 9. On the contrary, such change further augmented the testimonial conflict on the record as a whole.

Appellee's contention that no "new evidence" was presented in support of the motion (id. at 5) ignores the substantial changes in trial testimony by one officer. Its assertion that "the trial judge read the transcript of the hearing, thereby acquainting herself with all of the facts before rendering her decision" misconceives appellant's position. Id. at 5, 10.

Action by the trial court in this instance amounted to nothing more than denying appellant's motion to dismiss on the basis of the pre-trial denial of his motion to suppress. Appellant's Brief, pp. 15-16. Appellant was entitled to a de novo hearing, in view of the additional material contradictions in police testimony at trial which it was impossible for appellant to have anticipated.8/

8/ Rule 41(e), Federal Rules of Criminal Procedure, specifically excludes from its requirement that motions to suppress be made before trial in such a situation, i.e., where "opportunity therefor did not exist or the defendant was not aware of the grounds for the motion." This Court has recently pointed out that, "Rule 41 is a rule of practice designed to eliminate delay during trial. But a rule of practice cannot prevail over a constitutional right." Anderson v. United States, ___ U.S. App. D.C. ___, 352 F.2d 945, 947 fn. 4 (1965).

Failure to hear and grant appellant's motion cannot be remedied by the trial court "advising the jury to consider such [testimonial] inconsistencies in resolving what evidence to credit." Appellee's Brief, p. 10. The issue of unlawful arrest was a question of law to be determined by the court and not by the jury.[9/] Appellant's Brief, p. 28.

Appellant's motion should have been heard and granted by the trial court, because police testimony concerning the circumstances of appellant's arrest was inherently incredible on the entire evidence. Jackson v. United States, No. 19,135, decided November 4, 1965.

Conclusion

For the reasons stated above, appellant's judgment of conviction should be reversed.

Respectfully submitted,

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9/ Thus, appellant was not permitted at the trial of this case to adduce evidence relating to his unlawful arrest. Trial Transcript, p. 92.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,489

WILLIAM M. ROUSE, JR., Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

CERTIFICATE OF SERVICE

I hereby certify that a copy of appellant's Reply Brief in Forma Pauperis has been mailed, postage prepaid, to the Attorney General of the United States, attention Mervin Hamburg, Esq., United States Department of Justice, Washington, D. C., and to Frank Q. Nebeker, Esq., Assistant United States Attorney, United States Courthouse, Washington, D. C. 20001, this 7th day of February, 1966.

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BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,489

WILLIAM M. ROUSE, JR., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
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Assistant United States Attorneys.

MERVYN HAMBURG,
Attorney, Department of Justice.

Cr. No. 154-65

QUESTIONS PRESENTED

1. Whether the court below was correct in denying a motion to suppress evidence where the testimony showed that the incriminating evidence was not seized from appellant but found in a pile of wood where appellant had abandoned it, and the arrest followed its discovery.

2. Whether minor inconsistencies in the testimony of the police officers made their testimony inherently incredible, thereby rendering the court's denial of appellant's motion to suppress "clearly erroneous."

3. Whether the trial judge properly declined to reopen the issue of arrest and search and seizure after one of the arresting officers clarified the minor inconsistencies which had existed at the pretrial hearing and gave testimony consonant with that of the other arresting officer.

INDEX

TABLE OF CASES

Cases—Continued

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,489

WILLIAM M. ROUSE, JR., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant was convicted of two counts charging violations of federal narcotics laws, 26 U.S.C. 4704(a) and 21 U.S.C. 174. He was sentenced on May 28, 1965, to imprisonment for five years on each count, to run concurrently.

The evidence may be summarized as follows:

On January 8, 1965, at approximately 4 a.m., while on routine patrol in an unmarked cruiser, police officers Jenkins and Whited drove south on 14th Street in Northwest Washington, turned right onto R Street, and then entered

an alley between 14th and 15th Streets (H. 12, 30, 41-42; Tr. 8, 74).[1] When appellant, who was in the alley, saw the car, he fled into an intersecting alley which paralleled R and S Streets and ran westward toward 15th Street (H. 17; Tr. 9, 74). The policemen pursued appellant and saw him run into an alley cutoff, where he placed a white package in the middle of a stack of wooden pallets (H. 25-27, 47; Tr. 9-10, 74). The policemen stopped their car at the cutoff, and while Jenkins proceeded to the woodpile, Whited went over to talk to appellant, who was then walking back to the main alley (H. 23, 48; Tr. 11-12, 75). Intending to determine why appellant was in the alley that time of the morning, Whited identified himself and asked appellant his name and address (Tr. 91; H. 88, 102). Then Jenkins called out to Whited that the package he located in the woodpile contained heroin (H. 28; Tr. 94, 104). Appellant was thereupon placed under arrest and charged with violating the narcotics laws and vagrancy (H. 59; Tr. 91).

Appellant, who testified at the hearing on his motion to suppress evidence but not at the trial, stated that he was arrested while leisurely walking along S Street. He was immediately searched by the officers, who had neither a search nor an arrest warrant (H. 63-65). He denied both being in an alley and running from a police car (H. 65-66).

At the hearing on the motion to suppress, the testimony of the two arresting officers contained certain variances. Whited stated that Jenkins was driving the cruiser (H. 11), but Jenkins said that Whited was the driver (H. 39). Whited stated that when they entered the alley on routine patrol duty, he saw appellant positioned south of the intersecting alley, and when appellant spotted the cruiser, he ran north and made a left turn into the side alley (H. 12, 20). Jenkins testified that appellant was near the north end of the alley, walking in a southerly

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[1] "H." denotes the transcript of the pretrial hearing on appellant's motion to suppress evidence. The transcript of trial is designated "Tr."

direction, and when he sighted the car, he increased his pace and made a right turn into the adjoining alley (H. 45-46).

Prior to ruling the court expressed concern over the inconsistencies, indicating that they should not be ignored although they involved matters preliminary to the arrest and alleged search and seizure (H. 76-80). Then the court denied the motion to suppress (H. 80-81):

> THE COURT: All right. Mr. Koonz [defense counsel], the Court is going to deny the motion, and with a right to renew, of course, during the course of the trial, and you are appointed counsel.

At trial Officer Jenkins recalled that he was the driver and that Whited's version of appellant's flight into the side alley was correct (Tr. 8-10, 32, 36-37). He explained the discrepancy between his testimony at trial and at the hearing by stating that he had previously confused the facts of this case with another narcotics case which occurred under similar circumstances twenty days before appellant's arrest. At the conclusion of Jenkins' testimony appellant moved to dismiss the indictment (Tr. 71). Judge Matthews, the trial judge, ascertained that appellant's motion was based upon the same grounds as his pretrial motion. She advised appellant that she desired to continue the orderly progress of the case, and that where one judge had already passed upon a motion, she was not disposed to hear a renewal of it (Tr. 71-72). Later, during the cross-examination of Officer Whited, defense counsel raised questions concerning the legality of the arrest. Judge Matthews excused the jury and advised counsel that overnight she would read the transcript of the pretrial hearing before Judge Walsh (Tr. 94-97). The next day Judge Matthews announced that she had read the transcript and, acknowledging appellant's right to renew the motion to suppress, denied it "on the basis of this very full hearing that you have already had before Judge Walsh" (Tr. 99). Judge Matthews further stated that she would consider Judge Walsh's ruling the law of the

case (Tr. 100). Defense counsel asserted that his "only reason" for renewing the motion was based upon Judge Walsh's closing remarks inviting such a renewal. Judge Matthews then commented (Tr. 100-101):

> Well, I don't believe that Judge Walsh, in what he said, meant to imply that this Court was going to go over again all the territory he had covered. I think what Judge Walsh meant is, for the protection of your client, you would renew this motion and then the Court would act upon it and you would have the benefit of having made this motion and the Court having acted upon it.

At the conclusion of the prosecution's case both sides rested. In her instructions to the jury Judge Matthews advised them to judge the credibility of each witness, taking into consideration, *inter alia*, any contradictions in testimony between what the witness said now and what he said on other occasions (Tr. 125-126).

RULE INVOLVED

Rule 41(e), Federal Rules of Criminal Procedure, provides:

> A person aggrieved by an unllawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the

district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

SUMMARY OF ARGUMENT

Appellant's claim that the evidence he sought to suppress was the product of an illegal search and seizure or illegal arrest is based upon his version of the incident, which the court rejected. The prosecution's evidence clearly provided that no search of appellant took place, since the policemen located the heroin in a wood pile where appellant had deposited it, and the arrest followed. The inconsistencies in the testimony of the two arresting officers were minor and related only to events leading up to the critical stage. The credibility of these witnesses was considered and decided by the court which heard them testify. Since their testimony was not "inherently incredible" and the lower court's ruling was not "clearly erroneous," there is no occasion to upset the findings.

The trial judge's decision not to reopen the issue of illegal arrest and illegal search and seizure was correct. The change in one officer's testimony so as to clarify the inconsistencies which prevailed at the pretrial hearing was clearly explained. No new evidence was adduced. As an added safeguard, the trial judge read the transcript of the hearing, thereby acquainting herself with all of the facts before rendering her decision. Under these circumstances it cannot be said that the trial judge abused her discretion.

ARGUMENT

I. The pretrial motion to suppress was properly denied.

(H. 16-33, 52-53, 57-61; Tr. 9-12, 23, 50-51, 56, 74-75, 88, 91)

Appellant's claim that the evidence he sought to suppress was the fruit of an illegal arrest or illegal search and seizure is based solely upon his own version of the incident. His explanation, however, has been rejected by the court below, which credited the prosecution's evidence in denying the motion to suppress. This evidence clearly indicates that appellant's arrest was lawful, and that nothing was seized from his person. The narcotics were located after appellant had abandoned them in the pile of wood, and appellant's arrest followed *Hester* v. *United States*, 265 U.S. 57 (1924); *Jackson* v. *United States*, 112 U.S. App. D.C. 190, 301 F.2d 515 (1961), *cert. denied*, 369 U.S. 859; *Lee* v. *United States*, 95 U.S. App. D.C. 156, 221 F.2d 29 (1954); *Burton* v. *United States*, 272 F.2d 473 (9th Cir. 1959), *cert. denied*, 362 U.S. 951.

Appellant ineffectually attempted to adduce testimony that the officers arrested him before locating the heroin which he had deposited in the wood stack. The policemen, on late night vagrancy duty, were firm in attesting that they recognized appellant as a known criminal shortly before his arrest, but that Whited originally stopped him merely to ascertain the reason for his presence in the alley at a late and unusual hour. The arrest did not take place until after the discovery of the heroin (H. 23, 29, 34, 48-49, 60-61; Tr. 23, 50-51, 88, 91-92). Cf. *Freeman* v. *United States*, 116 U.S. App. D.C. 213, 322 F.2d 426 (1963).

II. Since the testimony of the prosecution witnesses was not inherently incredible, and the rulings of the court below were not clearly erroneous, these rulings should not be overturned.

(H. 11; Tr. 37, 59, 89-90)

Appellant concedes, and rightly so, that his assignments of error "involved only a factual determination with respect to the circumstances of his arrest" (Br. 26). Since appellant's version of the facts surrounding his arrest is inherently incredible, and the court clearly rejected it while expressing concern over the inconsistencies in the prosecution's case (H. 76), the matter then resolves itself into a question of the credibility of the police officers. *United States* v. *Ziemer*, 291 F.2d 100 (7th Cir. 1961), *cert. denied*, 368 U.S. 877. This is primarily an issue for the court which saw the witnesses and heard them testify to resolve. *United States* v. *Hilbrich*, 341 F.2d 555 (7th Cir. 1965), *cert. denied*, 381 U.S. 941; *McDonald* v. *United States*, 307 F.2d 272 (10th Cir. 1962); *United States* v. *McCarthy*, 297 F.2d 183 (7th Cir. 1961), *cert. denied*, 369 U.S. 850; *United States* v. *Vita*, 294 F.2d 524 (2d Cir. 1961), *cert. denied*, 369 U.S. 823, 866; *Channel* v. *United States*, 285 F.2d 217 (9th Cir. 1960). As the court stated in *Hargrove* v. *United States*, 139 F.2d 1014 (5th Cir. 1944), *cert. denied*, 321 U.S. 1014:

> We are not triers of fact. The law, in its wisdom, does not authorize this court to substitute the reactions as to the facts which it gains from a perusal of the cold, printed type for those of the lower court which saw and heard the witnesses, observed their demeanor on the stand, and thus was placed in a far better position to know the true and false than this court . . . .

The rule that the lower court determines credibility of witnesses is, of course, predicated upon the assumption that the court did not abuse its discretion in arriving at its decisions. *United States* v. *Johnson*, 327 U.S. 106 (1946); *United States* v. *Jones*, 302 F.2d 46 (7th Cir.

1962). Recently, this Court in a criminal case followed the narrow "clearly erroneous" standard of Rule 52(a), F.R. Civ. P., that findings of fact should not be set aside unless the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. *Jackson* v. *United States*, No. 19,134, decided November 4, 1965. See also *United States* v. *Mathias*, 298 F.2d 790 (6th Cir. 1962), *cert. denied*, 370 U.S. 947.

Unlike *Jackson*, the entire evidence in this case does not render the testimony of the policemen "inherently incredible." The policemen reacted as expected when they saw a man in a back alley at 4 a.m. running away as soon as he saw them. Furthermore, unlike *Jackson*, the transcripts of the hearing and the trial contain credible explanations for the inconsistencies of testimony. The hearing on the motion to suppress took place almost two months after appellant's arrest. Since the usual practice of policemen assigned to cruisers is to alternate the drivers each day (H. 11), Jenkins' failure to recall that he was the driver was understandable. At the trial Whited's testimony was unshakingly consistent with his pretrial averments, and Jenkins agreed with Whited that he, Jenkins, drove the cruiser and that appellant ran north upon sighting the unmarked car and turned left into the adjoining alley. Jenkins accounted for this change in testimony by stating that at the hearing he had confused the facts of this case with another narcotics case involving similar circumstances, in which an arrest was made twenty days prior to the instant one (Tr. 37). After the hearing Jenkins conversed with Whited and realized that he had been mistaken (Tr. 37, 89-90). Accordingly, there is no occasion to question the credibility of the policemen, whose testimony plainly shows that appellant was not searched, that the incriminating evidence was not seized from his person or control, and that the ensuing arrest was based upon probable cause.

III. The trial judge properly declined to reopen the decided issue of arrest and search and seizure.

(Tr. 71-72, 94-101, 125-126)

The decision of Judge Matthews not to reopen a decided issue was eminently correct. *United States* v. *Jennings*, 19 F.R.D. 311 (D.D.C. 1956), *aff'd*, 101 U.S. App. D.C. 198, 247 F.2d 784 (1957); *United States* v. *Brewer*, 24 F.R.D. 129 (N.D. Ga. 1959). If the trial judge were compelled to retry the issue of illegal arrest, then the pretrial hearing would have served no purpose whatsoever, and the orderly trial of the case would have been severely disrupted with unnecessary delays for an interlocutory matter already considered and decided.[2] Thus Judge Matthews' interpretation of Judge Walsh's final remarks was accurate. See *Waldron* v. *United States*, 95 U.S. App. D.C. 66, 70, 219 F.2d 37, 41 (1955); *United States* v. *Watts*, 319 F.2d 659 (2d Cir. 1963).

Appellant's reliance upon *Gouled* v. *United States*, 255 U.S. 298 (1921), is misplaced. Certainly if during the course of a trial it becomes evident that a pretrial ruling was erroneous, the trial court has a duty to entertain a renewed objection. In this case, the fact that Officer Jenkins changed his testimony at trial and thereby clarified the inconsistencies between his evidence and the testimony of Officer Whited did not raise a new question of unconstitutional arrest based upon new evidence. The clarifications served to bolster the evidence upon which Judge Walsh rightly based his decision, and did not alter the material facts of the arrest but merely some of the

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[2] *Anderson* v. *United States*, —— U.S. App. D.C. ——, 352 F.2d 945 (1965), is not to the contrary. In *Anderson*, as in *Jennings*, *supra*, the trial judge stated that he felt bound by the pre-trial ruling but nevertheless proceeded to hear evidence as to the legality of the challenged search. This Court concluded:

> The evidence taken on the motion to suppress and at trial clearly demonstrates that the motion to suppress was without merit. There the matter ends. 352 F.2d at 947.

Neither *Anderson* nor *Jennings* requires reversal under the circumstances of this case.

recollections as to the circumstances of the arrest before the critical stage. Other than these minor inconsistencies brought out at trial, defense counsel had nothing more to add to the pretrial testimony, the transcript of which Judge Matthews, as an extra precaution, read before rendering her decision to deny the renewed motion. Thus her decision not to reopen the issue of illegal arrest and search and seizure was based upon substantially the same testimony as was elicited at the pretrial hearing,[3] and was made with full awareness of the events which prompted Judge Walsh's decision and the ensuing incidents. Then Judge Matthews placed the matter of the inconsistencies in testimony in its proper context by advising the jury to consider such inconsistencies in resolving what evidence to credit (Tr. 125-126). The resultant finding of guilty was without error.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

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[3] The trial judge would have abused her discretion if, relying upon "substantially the same testimony" elicited at the pretrial hearing, she reached an opposite conclusion. See *United States* v. *Wheeler*, 256 F.2d 745, 748 (3d Cir. 1958): "[T]he decision on what was substantially the same testimony was nothing more than a review of Judge Miller's earlier decision and was an abuse of discretion. Such a review would under the circumstances have been an abuse even had the result been the same as Judge Miller's though the error would, of course, then have been harmless."

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